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**Citation for published version:**

Ghaleigh, N-S, *Constitutional Vectors and the Scottish Independence Referendum 2014 (II)*, 2014, Web publication/site, Revista Catalana de Dret Public Blog. <<http://blocs.gencat.cat/blocs/AppPHP/eapc-rcdp/2014/07/15/constitutional-vectors-and-the-scottish-independence-referendum-2014-ii-navraj-singh-ghaleigh/>>

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### [Constitutional Vectors and the Scottish Independence Referendum 2014 \(II\) – Navraj Singh Ghaleigh](#)



This blogpost is the second part following on from the [first part](#) published yesterday

#### ***The Two Referendum Acts***

With the Edinburgh Agreement settling the arcane (to the general public at least) issues of competence, the Scottish Parliament moved quickly to legislate for a referendum. This consisted of two elements: one Act of the Scottish Parliament to define the franchise for the referendum ('the Franchise Act')[1], and a second providing for the framing of the actual question being voted upon, oversight of the poll, and conduct rules for the campaign, including matters of funding and expenditure ('the Referendum Act')[2]

The Franchise Act is not controversial. It adopts the existing franchise used for Scottish Parliament elections which in turn adopts that used in local government election. What may be of interest is the relative breadth of that franchise – it includes not only British citizens but also, Irish, other European Union and qualifying Commonwealth citizen. It is also innovative in that it extends the franchise to sixteen and seventeen year olds in the referendum. In terms of comparative practices of lowering the voting age to sixteen, there has been experience of this in Germany (where five of sixteen German Laender have adopted such practices), Austria, the Isle of Man, Guernsey and Iran. The Australian Capital Territory conducted an inquiry into voting age in 2007, which raised concerns about the risk of fraud, personage, and bribery/sale of votes.[3] These concerns have been little discussed in UK and Scottish debates. Whatever the merits of this extension, it places a strain on the UK's current system of household registration. This has been extensively criticised by the Council of Europe for its susceptibility to electoral fraud.<sup>[4]</sup> Moreover, in the estimation of the UK's Electoral Commission that the electoral register is only 82.3% complete.<sup>[5]</sup>

The Referendum Act is something of a disappointment. It scarcely departs from the referendum scheme of the UK's *Political Parties Elections and Referendums Act 2000 (PPERA)*, [6] and where it does so, it does so ill advisedly. Quite rightly the Scottish

Government has stated that the 2014 referendum should be “conducted and regulated to the highest international standards.”<sup>[7]</sup> Unfortunately, this policy objective has had no discernible impact on the substance of the Act. There is no evidence, either on the face of the Act or the accompanying documentation of non-trivial engagement with the voluminous comparative experience of referendums.<sup>[8]</sup> Rather, the Act has sought to ensure that the conduct and regulation of the Referendum map the United Kingdom’s standards, aping the scheme in PPERA. Whatever else may be said of PPERA, it does not track the highest international standards. This is especially true for its Part VII which pertains to the funding of referendums.

It is worth reminding ourselves why PPERA’s approach to referendums has always been seen as questionable. PPERA was stamped from the cookie cutter of the Committee on Standards in Public Life (‘CSPL’).<sup>[9]</sup> *The Funding of Political Parties in the United Kingdom*<sup>[10]</sup> closely mapped the Labour Party’s policy preferences and was subsequently enacted as the *Political Parties Elections and Referendums Act 2000*. The one exception to this is Part VII on referendums, where the CSPL exhibited some independence. For referendums alone (ie. in distinction to the scheme for all other elections), the CSPL rejected the notion of expenditure limits, of *ex ante* disclosure, and of public funding. The reasons for these are highly contingent – the referendum debate of the day (late 1990s) was entry into the Euro. Moreover, two of the more significant members of the committee were overtly euro sceptical – the Chair and Labour’s Peter Shore. Among the community of party finance scholars, Part VII’s status as a conceptual outlier is attributed to these factors. It was designed to ensure (or rather, avoid) a particular outcome in a particular vote.

That said, large parts of the regulatory regime that pertain to referendums are in fact general to PPERA. Matters such as the control of donations, loans etc, monitoring and securing compliance, and the Electoral Commission’s investigatory powers are shared with other electoral events and have been provided to work more or less satisfactorily. To the extent that there are shortcomings, the new range of sanctions contained in the Referendum Act – stop notices, enforcement undertakings etc – (which are substantially similar to those included in the PPERA regime by section 3 of the PPEA 2009<sup>[11]</sup>) are very welcome. Breaches that previously incurred criminal proceedings and referral to the Crown Prosecution Service (in England)/Procurator Fiscal (in Scotland), can now be dealt with by the new array of civil sanctions. This flexibility, which the Commission had long been arguing for, may have resulted in different outcomes to well-known party finance scandals.<sup>[12]</sup> The below considers some of the less satisfactory aspects of the Act, some departing from PPERA’s scheme, some not.

### *The Referendum Period*

Tucked away in Schedule 8 of the Act, in the long list of terms for interpretation, is the line that “‘referendum period’ means the period of 16 weeks ending on the date of the referendum”. Although this term serves a number of differing purposes,<sup>[13]</sup> for finance purposes it carries the heavy burden of demarcating the period during which monies expended in campaigning count for the purposes of the campaign limits. These limits – total referendum expenses – vary according to the status of the body in question – up to £10,000 for ordinary individuals or bodies,<sup>[14]</sup> £150,000 for non-party permitted participants,<sup>[15]</sup> or £1,500,000 for Designated Organisations,<sup>[16]</sup> or for registered political parties a formula based on success in the previous Scottish Parliament election is used.<sup>[17]</sup> However, these limits will only apply to money expended in the period 29 May 2014 to 18 September 2014. Any sums expended prior to that time are unconstrained by expenditure limits. The distortive effect of this is easily anticipated.

We have been here before in the UK. Pre-campaign expenditure has been a growing trend in general elections, especially in the all-important ‘target seats’,<sup>[18]</sup> with the attendant argument that the regulated campaign period of PPERA<sup>[19]</sup> failed to capture significant activity that might affect the election result.<sup>[20]</sup> The problem revolved around the issue of triggering – in the absence of fixed term parliaments,<sup>[21]</sup> when would the regulated campaign period commence? This was partially addressed by section 21 *Political Parties and Elections Act* by which expenditure is triggered by the adoption of a candidate – a solution which is easily gamed. In any event, that solution has no application in the referendum space. What could the triggering event be in executive dominated referendums (one can see that popular initiatives, the ‘referendum period’ could be triggered on the successful conclusion of an initiative)? The obvious solution is for the referendum period to commence upon the coming into force of this Act, thereby capturing all expenditure that contributes to the formation of public opinion in respect of the referendum.

The risk with the proposed constraint of only counting expenditure between 29 May 2014 and 18 September 2014 period is obviously that campaigners could ‘front load’ their expenditure in order to avoid the strictures of the Act and as such expend in an incontinent fashion. In the present Scottish context this is not so much a question of equality of arms between the campaigns (both sides are thought to have substantial financial reserves to draw upon) but of circumvention of expenditure limits and the ‘loudhailer effect’ – of well-funded speech drowning out less capital-friendly views.

### *Expenditure Limits*

Unlike *Committee on Standards in Public Life*<sup>[22]</sup> but like PPERA, the Act opts for expenditure limits. This is, in and of itself desirable and brings the regulation of referendums into line with the other forms of electoral campaigning.<sup>[23]</sup> But what of the levels and why index to Scottish Parliament elections rather than General Elections in Scotland, or local government elections, or indeed some combination of them?<sup>[24]</sup> The selection of index election leads to very different results. The risk is that without adequate justification – and there has not been to date – the Scottish Government will be accused of designing a scheme which is

skewed towards its own interests.

### *Public Funding, Absence of*

The absence of public funding from the Act's scheme is an oddity. Public funding is a constant feature of all UK politics, including the Scottish Parliament and its elections, and referendums under PPERA. It serves a number of valuable functions: levelling the playing field, providing unfunded voices with the capacity to contribute to the formation of public opinion, and publically demonstrating the value of viewpoint diversity. Almost all UK referendums to date have provided for public funding and those that have not have been justly criticised – viz. Wales 1997.

The stance of the Act not to support these practices or principles requires substantial justification. Presumably the argument is that both 'sides' have ample resources and so state provision is unnecessary. Or perhaps the argument is borne of austerity. In either case, it is unconvincing. Whilst it is true that both campaigns are already up and running, they are not and ought not to be the entirety of the campaign. The two campaign groups are closely related to the major political parties. Even if both sides are well funded, this does not take into account the substantial, non-party aligned, sections of Scottish public life that risk being drowned out by the familiar dominant voices. Scotland's vibrant civil society – its churches and faith groups, charities and not-for-profits, other association groups – which are often unaffiliated, should be supported by public funding even if the parties and official campaigns should not.

### *Disclosure Thresholds*

The £5,000 disclosure threshold was increased to £7,500 by *Political Parties and Elections Act 2009* ('PPEA').<sup>[25]</sup> Although this Act was principally a response to the spate of scandals that afflicted the Labour Party from 2005 onwards – 'Cash for

honours'/Lord Levy, Peter Hain's think tank, proxy donations and David Abrahams<sup>[26]</sup> – the legislature also took the opportunity to raise the disclosure threshold by 50%. The reasoning revolved around unsubstantiated ideas of "administrative convenience".<sup>[27]</sup>

The thinness of this reasoning is clear when one asks what administrative burden is lifted by raising the threshold? Is it the burden on the Electoral Commission or parties? If the former, is that a sufficient reason or even plausible in a world of electronic filing? If the latter, are there really so many donations at the local level around £1,500 that constituency parties (essentially volunteer operations) cannot cope with them? If this burden applies to central parties, similar considerations apply but their force is diminished owing to their non-voluntary staffing.

In any event, this threshold now places the UK in a dim light in comparison with the USA where federal candidates, party committees and PACs must disclose to the Federal Election Commission the name and address of any person who makes a contribution or contributions aggregating more than \$200 during a calendar year, together with the date and amount of any such contribution.<sup>[28]</sup> There is no obvious administrative reason why the Act could not make similar requirements for donations. Its effect on public knowledge of the reality of the donation landscape would be dramatic. A donation to a campaign of £7,499 would remain secret, yet its campaign effects would be significant. It would fund the printing of 450,000 leaflets – more than every household in Edinburgh. The idea that donations of this size should remain secret should be a source of embarrassment.

For the purposes of the Act however, PPERA's provisions are again passively replicated. These are hardly "the highest international standards". It is odd to have to argue, with a legislature that has full legislative competence in this matter, that opaque processes tend to facilitate corruption or capture. Corruption or its appearance is more likely because secret funding facilitates rent-seeking and transparent processes make *quid pro quos* more difficult, increasing the likelihood that they will be exposed. Rights-based arguments can also bring us to this same destination – transparent constitutional processes are a necessary precondition for citizens to participate in democratic self-government. In the presence of information asymmetries, citizens struggle to make meaningful decisions, as political equals, at the ballot box.

### *Foreign Donations*

The question of foreign donations was somewhat confused by a recent UK Supreme Court decision.<sup>[29]</sup> In any event, the broad position is that donations from those not on a UK electoral register are impermissible. Nonetheless, foreign donations are being actively solicited by at least one of the campaigns. The website of *Yes Scotland* states that "if you are not on an electoral register

in Scotland<sup>[30]</sup> we will not be able to accept a donation of *more than £500 from you*."<sup>[31]</sup> Their website further states that, "£5 produces 300 leaflets, £25 distributes leaflets to 300 homes, £50 sends a campaign team to a local event, £100 delivers a community campaign meeting, £500 sends a resource starter pack to five new local groups." That being the case, even a single 'legal' foreign donation can have notable campaign effects in a society as small as Scotland. Namely, a single foreign donation would fund the printing of 30,000 leaflets, or 6,000 homes leafleted, 10 campaign teams sent to local events, 5 community campaign meetings delivered or 5 resources starter packs sent new local groups. Given the large Scottish diaspora, and the active soliciting of such donations, even a trivial volume of such donations would have a distortive effect on the campaign, inimical to the statutory concept of the permissible donor.

### *Conclusions*

The 2014 Independence vote will be highly unusual in the UK's thin experience of direct democracy. It will be the first such poll capable of being characterised as a high salience referendum. For the first time voters will be given the decisive say in what is commonly agreed to be the 'most important issue' of the day. We should accordingly be careful when drawing lessons from past

referendums – what obtains in a mid- to low-salience contest (ie. practically all of the UK’s referendums to date) will not follow automatically in a competitive, closely fought campaign that holds the nation’s attention.

The various failings of the Act should be a cause for concern. Whilst it is commonly said during the passage of the Act, under the Chatham House rule, that the Government would not admit any substantial changes to it, it should be clear that such changes were necessary. The risk under the Act’s current scheme is that big money will dominate the referendum campaign, much of it from abroad, to squeeze out non-mainstream voices and hidden from public scrutiny and discussion.

In some respects the process of the Scottish Independence referendum highlights features of the United Kingdom constitution that have long been known to us. Foremost amongst these is that the Westminster elite struggles to deal with the idea of federalism, so wedded is it to the unitary state. Its rather incoherent attempt to engage with it in the form of devolution failed and was the catalyst for a process which will either disband the fundamental notion of the UK state, or at the least require a far more thorough process of power sharing.[32] Whether this extinguishes Westminster’s long term view that devolution is a thing apart, that doesn’t affect the centre, leaving the UK constitution to march onwards is so far unclear. What cannot be contested however is that such myopia is a sure path to constitutional instability. From the ‘Yes’ perspective, the constitutional future has already been mapped out in its ‘Constitutional Platform’, promising a written constitution.[33]

As regards the current referendum process, what is most striking is that substantive negotiations are preceding the referendum itself. Answers to vital questions on the state of an independent Scotland’s currency, or armed forces, or system of social security, or foreign relations take the form of claim and counterclaim by the opposing sides. Quite what the voting public is to make of this is not stated. The certain outcome is that the issue of independence will not be decided on the merits of the question as these have yet to be ascertained.

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[1] Scottish Independence Referendum (Franchise) Act 2013, available at <<http://www.legislation.gov.uk/asp/2013/13/contents>>, accessed on 2 July 2014.

[2] Scottish Independence Referendum Act 2013, available at <<http://www.legislation.gov.uk/asp/2013/14/enacted>>, accessed on 2 July 2014.

[3] Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (1st edn, Federation Press 2010).

[4] See Council of Europe Parliamentary Assembly, *Application to initiate a monitoring procedure to investigate electoral fraud in the United Kingdom*, AS/Mon (2007) 38 at para 84 for example.

[5] The Electoral Commission, *Great Britain’s electoral registers 2011* (2011) at 22

[6] Available at <<http://www.legislation.gov.uk/ukpga/2000/41/contents>>, accessed on 2 July 2014.

[7] Scottish Independence Referendum Bill, Policy Memorandum SP Bill 25-PM, Session 4 (2013), 1.

[8] Lutz and Hug (n 14).

[9] This quasi-independent body, then chaired by Sir Patrick Neill QC, was charged with the responsibility of enquiring into the funding of political parties by Tony Blair in 1997.

[10] Navraj Singh Ghaleigh, ‘The Funding of Political Parties in the United Kingdom: The Case for Cherry Picking’ [1999] Public Law 43.

[11] For the policy origins and consequences of these sorts of sanctioning systems, see respectively Richard Macrory, ‘Reforming Regulatory Sanctions: Designing a Systematic Approach’ in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State* (Oxford University Press 2010) <<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199593170.001.0001/acprof-9780199593170>> accessed 30 July 2012. And Ole W Pedersen, ‘Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law’ (2013) 33 Oxford Journal of Legal Studies 103.

[12] Navraj Singh Ghaleigh, ‘The Regulator: The First Decade of the Electoral Commission’ in Keith Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The Funding of Political Parties: Where Now?* (1st edn, Routledge 2011).

[13] Including marking the period within which prospective DOs must make their applications (Sch 4, Pt 2, paragraph 6(2) (b)).

[14] Sch 4, Pt 3, paragraph 17.

[15] Sch 4, Pt 3, paragraph 18(1)(c).

[16] Sch 4, Pt 3, paragraph 18(1)(a).



[17] Sch 4, Pt 3, paragraph 18(1)(b). See further ¶8 below.

[18] Ron Johnston and Charles Pattie, 'Funding Local Political Parties in England and Wales: Donations and Constituency Campaigns' (2007) 9 The British Journal of Politics and International Relations 365.

[19] Defined at PPERA section 80.

[20] J Fisher, 'From Foot-Slogging to Call Centres and Direct Mail: A Framework for Analysing the Development of District-Level Campaigning' (2008) 47 European Journal of Political Research 794.

[21] As a consequence of the Fixed-term Parliaments Act 2011, now less of an issue.

[22] Fifth Report of the Committee on Standards in Public Life, 'The Funding of Political Parties in the United Kingdom' (The Stationery Office 1998) ¶12.46.

[23] See EN at ¶150ff.

[24] See Policy Memo ¶81.

[25] c.12 Pt 2 s.20(3) (January 1, 2010). For local parties, the disclosure threshold was raised to £1,500 and for the purposes of permissibility from £200 to £500.

[26] Navraj Singh Ghaleigh, Paul Reid, and Ben Kemp, 'Politics As A Profession: Electoral Law, Parliamentary Standards and Regulating Politicians' [2012] Public Law.

[27] HC Deb, vol 488, col 588, 2 March 2009; PBC cols 78-81, November 6, 2008.

[28] Federal Election Campaign Law, compiled by the Federal Election Commission (2008), available at <http://www.fec.gov/law/feca/feca.pdf>.

[29] *R (on the application of the Electoral Commission) (Respondent) v City of Westminster Magistrates Court (Respondent) and the United Kingdom Independence Party (Appellant)* [2010] UKSC 40.

[30] As a matter of law, this is incorrect. A permissible donor, either in the terms of PPERA (section 54) or the Referendum Act (Sch 4, Part 1, section 1(2) and (3)) is *inter alia* an individual registered in an electoral maintained under section 9 of the *Representation of the People Act 1983*.

[31] Yes Scotland, 'Help our campaign with a donation', <<https://yesscotland.nationbuilder.com/donations>> accessed on April 3, 2013.

Emphasis added. By contrast, the Better Together website states that, "we will ask all donors to confirm they are not from overseas; we will check that anyone who gives a donation of over £500 is not from overseas." Moreover, those wishing to execute an online donation, are required to complete a tick box stating that "I Confirm That I Live In The United Kingdom And Am On The UK Electoral Register." <<https://secure.bettertogether.net/page/contribute/default>> accessed on April 3, 2013.

[32] Simon Johnson, 'UK Parties Make Joint Promise on More Powers for Scotland' The Daily Telegraph (15 June 2014) <<http://www.telegraph.co.uk/news/uknews/10901545/UK-parties-make-joint-promise-on-more-powers-for-Scotland.html>> accessed 2 July 2014.

[33] Scottish Government, 'The Scottish Independence Bill' (16 June 2014) <<http://www.scotland.gov.uk/Resource/0045/00452762.pdf>> accessed 2 July 2014.

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